

197184

ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & WOLLY, P.C.

1025 CONNECTICUT AVENUE, N.W.

SUITE 712

ROBERT E. PAUL**+
MICHAEL T. LEIBIG**+
WENDY L. KAHN**#
WILLIAM W. THOMPSON, II**+°
MICHAEL S. WOLLY*°
DANIEL G. ORFIELD**°

WASHINGTON, D.C. 20036-5420

(202) 857-5000

FAX: (202) 223-8417

ABRAHAM L. ZWERDLING (1914-1987)

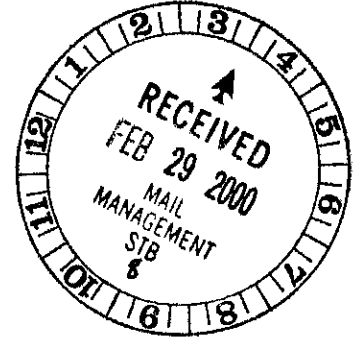
VIRGINIA OFFICES
4012 WILLIAMSBURG COURT
FAIRFAX, VIRGINIA 22032
(703) 934-2675
FAX: (703) 934-2678

CARLA MARKIM SIEGEL**+
KIMBERLY A. SIMON#
CAROL M. ITEN**

*DC #MD +VA °NY **CO

February 29, 2000
BY HAND DELIVERY

Surface Transportation Board
Office of the Secretary
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

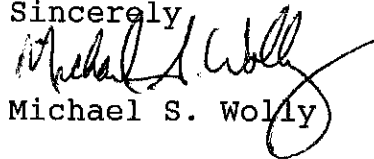


Re: Ex Parte No. 582 Public Views on Major Rail Consolidations

Dear Mr. Williams:

Pursuant to the Board's Notice of Public Hearing, please find enclosed an original and ten copies of the Comments of the International Brotherhood of Electrical Workers, the American Train Dispatchers Department - BLE, and the Brotherhood of Railroad Signalmen. We enclose an electronic copy of same on 3.5" disk in WordPerfect 8 format. Thank you.

Sincerely,


Michael S. Wolly

Enclosures

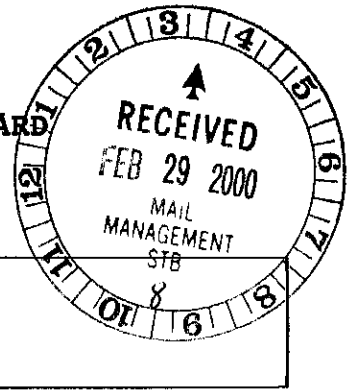
ENTERED
Office of the Secretary

FEB 29 2000

Part of
Public Record

197184

BEFORE THE SURFACE TRANSPORTATION BOARD



In the Matter of Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

ENTERED
Office of the Secretary

FEB 29 2000

Part of
Public Record

COMMENTS OF
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AMERICAN TRAIN DISPATCHERS DEPARTMENT OF THE
INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
AND BROTHERHOOD OF RAILROAD SIGNALMEN

Michael S. Wolly
ZWERDLING, PAUL, LEIBIG,
KAHN, THOMPSON & WOLLY
1025 Connecticut Avenue, NW
Suite 712
Washington, D.C. 20036
(202) 857-5000

Attorney for IBEW, ATDD and BRS

The International Brotherhood of Electrical Workers ("IBEW"), the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers ("ATDD"), and the Brotherhood of Railroad Signalmen ("BRS") submit these Comments in response to the Board's Notice of January 24, 2000. Based on the experience of our respective memberships during mergers that have been approved by the Interstate Commerce Commission and this Board since deregulation of the railroad industry, we do not believe that additional consolidations would be good for the industry, its employees, its customers, or the broad public interest. We show below that the lessons of recent mergers, which undeniably have caused a deterioration in industry stability and efficiency, should cause the Board to seriously consider a moratorium on further mergers.

* * * * *

Our experience is that despite pre-merger lip service that mergers present great opportunities for the rank-and-file work force, rail management does little to bring those supposed benefits to life. Rather than creating incentives for employees to promote greater efficiencies to make a merger work, carriers have used mergers as tools to take away from employees hard fought agreement rules that management finds onerous. Carriers continue to insist that the success of mergers is directly keyed to the vitiation of collective bargaining agreements. Time and again, after a merger carriers demand that employees adhere to a

single agreement, not by integrating multiple agreements into one, but by yielding to the agreement the carrier determines to be more favorable. Why should employees respond favorably to carrier appeals to make a merger work under such conditions?

Management has been able to behave this way because the Board and the ICC before it have enabled it to do so by an extremely broad interpretation of the override provision in the statute. The Board has interpreted the requirement that a contract override be "necessary to the implementation of the transaction"¹ so loosely that no arbitrator has denied management's broad contention that its operation would be more efficient if the rules it agreed to with the union before the merger were eliminated. In any other context, "necessity" means "need." Under the Board's interpretation of 49 U.S.C. § 11321², "necessity" equates with little more than "facilitation." The threshold is so low that to justify an override, management has been required to prove *only* that it would be easier to implement the transaction without the collective bargaining agreement in place.

Armed with that interpretation, merged carriers have nothing to lose by demanding the elimination of unfavorable agreements.

¹ Norfolk & Western Ry. Co. v. American Train Dispatchers Association, 499 U.S. 117, 127 (1991).

² "A rail carrier...participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law...as necessary to let that rail carrier...carry out the transaction...."

After all, what company would maintain that it operates more efficiently because its managerial discretion is fettered by a collective bargaining agreement? What company would not use the authority granted by the Board in approving a merger to remove as many employees from an agreement to a non-agreement workplace as it could?

We of course are familiar with the frequent response that voluntary implementing agreements have been reached more often than not. But "voluntary" is a misleading term in this context. When agreements are reached, it is against the threatening background of arbitration that is highly deferential to management's desires. The burden of proof on a carrier is so minimal under the Board's precedent that the implementing agreements reached outside of arbitration can hardly be considered exemplars of true collective bargaining. When management desires to eliminate an agreement in the wake of a merger, it rarely (if ever) fails to accomplish that desire. Arbitration, rather than a neutral field-leveling process, has become a bludgeon that labor generally has sought to avoid.

Significant labor-management strife has ensued from this unfortunate, expansive interpretation by the ICC and the Board. Far more "us vs. them" issues have flowed from approved mergers than otherwise reasonably could have been expected. In many cases, employees whose job responsibilities and locations have remained the same have been subjected to wholesale elimination of agreements. For example, former Conrail signalmen and

electricians whose geographic territories and responsibilities were not affected by the transaction no longer enjoy the Conrail agreement rules under which they worked before the merger. These employees justifiably feel they have been taken advantage of when the day-to-day operation stayed as-is. Across the board, even when a carrier contemplates only a minor operational change, the corporate mind set is to seize the opportunity to effect major changes in agreement provisions.

Furthermore, it has become obvious in recent mergers that management has become obsessed with headcounts. Why, if there is so much inefficiency in the industry, are carriers profitable pre-merger and less profitable afterwards? Why does management not cut back employment before a merger if a carrier is plagued with such alleged inefficiencies? It is certainly curious that so many employees who were making each of the pre-merger carriers operationally efficient become dispensable after a merger. We know of no carrier that does not possess the ability to eliminate unnecessary jobs at any time. Does a merger suddenly make an efficient workforce inefficient? Of course not. However, the experience of recent mergers reveals that management only realizes that after decimating job cuts have been instituted and rail operations stall. Management's response in such situations is to push the remaining employees to work longer hours and/or to out source work to firms who feed on the carriers' operational woes.

A particularly significant detrimental operational

ramification has occurred in the area of rail traffic control. The cadre of experienced train dispatchers has been thrown into turmoil. Centralization of train dispatching has resulted in post-merger carrier demands that dispatchers uproot their families to relocate to new offices. Many dispatchers, preferring not to move, either change their careers (in many cases leaving the industry) or look for work with other carriers operating near their homes.

For example, after Burlington Northern Santa Fe centralized BN and SF operations in Fort Worth, Texas, the median seniority date amongst a workforce of over 600 train dispatchers dropped dramatically as experienced dispatchers left the craft. More than half of those dispatchers now working for the carrier have less than five years' seniority. When the more senior dispatchers left, a significant break in the carrier's aggregate level of dispatching experience occurred.

Train dispatching is not a profession whose responsibilities can be assigned incrementally. The loss of experienced train dispatchers necessarily has an immediate effect on rail traffic control efficiency. Further, the difficulties associated with finding and qualifying new train dispatchers is compounded by the requirement that the experienced dispatchers who stay become familiar with the dispatching systems on the merged carrier.³

³ Different carriers utilize different train dispatching technologies and equipment. Even those with the same physical dispatching equipment usually employ different philosophies of dispatching. The incompatibility of these systems require merged
(continued...)

All this causes the merged carriers to demand that their train dispatchers work more days between days off. It is not unusual for train dispatchers on merged carriers to work weeks without a day off. The fatigue caused by the lack of time off to decompress is manifest. Fatigue is a major cause of dispatcher error, a consequence the industry can ill afford.⁴

The pending Canadian National/BNSF application forebodes more trans-border merger requests. As the Board is well-aware, such transactions raise significant issues of the extraterritorial application and enforcement of United States laws. Transnational corporations implement transfers of work from one country to another. The transferred work may be safety-sensitive, subject to federal regulatory oversight in this country that is absent or less encompassing in the foreign country. Most recently, that became evident in the dispute over Canadian Pacific Railway's desire to transfer train dispatching functions over former Delaware & Hudson lines to Montreal. Permitting control of domestic rail traffic from dispatching centers in other countries, which now is technologically possible, places those operations beyond the jurisdiction of the Federal Railroad Administration and the National Transportation

³(...continued)
carriers to select one or the other (or an entirely new system) as part of the centralization process.

⁴ Burlington Northern Santa Fe answer to the problem apparently is to tighten the disciplinary screws. The carrier's assessment of discipline to train dispatchers has increased four to five fold since the merger. We believe that this is largely attributable to errors caused by the increased workload.

Safety Board. Employees in other countries are not subject to the same stringent drug and alcohol testing and hours of service limitations that apply to their cohorts in the United States. The Board should not allow more rail consolidations that contemplate trans-border operations until a firm policy has been established addressing the safety ramifications of such consolidations, in concert with all federal agencies with responsibilities for rail safety.

Have recent mergers resulted, even indirectly, in an expansion of the industry's base? Hardly. If not unanimous, shippers are in very large part dissatisfied with the results of the mega-mergers that have marked the industry in recent years. Gridlock, meltdown, and Union Pacific became synonymous terms. The NS/CSXT/Conrail merger is another case in point. On-time performance has declined dramatically for the three carriers after the merger. This has resulted in the loss of business from two of former CR's most important time-sensitive customers, United Parcel Service (UPS) and General Motors (GM), who had to abandon the rails in favor of trucks.⁵ Moreover, overall service has declined since the transaction. According to a survey of shippers by the National Industrial Transportation League, "More than 80% of shippers said that NS service since Aug. 1 [1999] was

⁵ Popke, Michael "So far, not so good: NS, CSXT struggle to integrate Conrail." Progressive Railroading (July 8, 1999). Poor performance has resulted in the loss of major accounts that took many years to establish, a drastic setback for an industry that had finally returned to profitability.

worse than the service performed by Conrail."⁶ What's worse, not only has the loss of business to trucks increased the cost of shipping (Id.), the resulting greater truck traffic adds to highway congestion and increased levels of air pollution. Hardly the public transportation benefit promised.

NS and CSXT, like UP before them, maintain that these problems are short term only. However, it is certainly arguable that the loss of important business in the short run does not bode well for longer term expectations. It took former Conrail many years of service to establish the dependability needed to gain time sensitive, high volume freight. American business is demanding even faster, more dependable service. The slower, more irregular service the newly merged railroads are offering is a waste American businesses will not tolerate and cannot afford.

In pushing the Conrail transaction, CSXT and NSR argued that the track added to their routes by the elimination of the country's fifth most profitable railroad would lead to an increase in competition, thereby reducing transportation costs. It would create a "synergy of operations", they contended, that would reduce operating expense, in turn resulting in a significant benefit for public transportation. The events since the merger raise serious doubts about the accuracy of that prediction. All evidence indicates that transportation costs have increased due to delay and increased reliance on more

⁶ Watson, Rip. "Rail shippers' survey flunks CSX Corp., Norfolk Southern." The Journal of Commerce. (September 27, 1999).

expensive alternatives to rail transport, mostly trucks. Coal reserves at Northeastern power plants hit lower levels than before the acquisition as supplies are used faster than shipments are received. Citing American Association of Railroads data, the Journal of Commerce reported that "[w]hile Conrail Inc. handled more than 51,000 carloads of coal in the year-earlier period, CSX Transportation Inc. and Norfolk Southern Corp. hauled 28,000 fewer cars in October than the three carriers had a year earlier."⁷ If the product of "synergy" is reducing three highly profitable and reliable railroads into two less reliable, unprofitable, lumbering behemoths, then "synergy" is not something the Board should be promoting.⁸

A peculiar situation has developed. The carriers trumpet the alleged success of the hands-off benefits of deregulation while at the same time depending on the Board's hands-on regulation of labor agreements. According to Norfolk Southern CEO David R. Goode, a return to the era of government regulation "would be a mistake for our industry, its employees, customers, the communities we serve and for a nation of consumers who depend

⁷ Kaufman, Lawrence H., "Rail traffic slows in October, but intermodal volumes grow." The Journal of Commerce (November 24, 1999).

⁸ We cannot understand the argument that, at this point, with the number of major carriers so reduced, more mergers will promote better service due to increased competition. Claims that greater competition will result from reducing the number of competitors seem at odds with common sense.

on a robust transportation infrastructure".⁹ Mr. Goode exclaims that "[a]t Norfolk Southern, we resist any attempt at re-regulation, whether it comes in the form of mandated rates, forced access, or some other guise." Id. Nevertheless, NSR consistently has supported regulatory intervention when organized labor has resisted the abrogation of private contracts affecting railroad workers.

Rail labor certainly did not benefit from any of these transactions. Did the public benefit? Is the present environment in the best interests of the United States? We think not. The industry is essentially at odds with itself. Mega-carriers, for whom mergers once appeared to be the talisman of success, now are mired in the fall-out from the operational travesties they have wrought. Shippers are at their wit's end. The public has been ill-served by the labor and management struggle over "cramdown" for almost two decades. (The fact that a negotiated agreement on this issue finally may be in the offing does not eliminate the deep-seated resentment that has resulted.) All this leads to the inescapable conclusion that a pause is warranted.

For all these reasons, we do believe that additional consolidations would not benefit the industry, its employees, its customers, or the broad public interest that the Board was

⁹ Goode, David R., "Regulation: it's not the fix for short-term service issues." Paces Sept./Oct. 1999, at 1.

created to serve. The Board must seriously consider a moratorium on further mergers.

Respectfully submitted,



Michael S. Wolly
ZWERDLING, PAUL, LEIBIG,
KAHN, THOMPSON & WOLLY
1025 Connecticut Avenue, NW
Suite 712
Washington, D.C. 20036
(202) 857-5000

Attorney for IBEW, ATDD and BRS